

1 SANDY M. KAPLAN (SBN: 095065)
 2 BRYCE D. CARROLL (SBN: 208593)
 3 GORDON & REES LLP
 4 Embarcadero Center West
 5 275 Battery Street, Suite 2000
 6 San Francisco, CA 94111
 7 Telephone: (415) 986-5900
 8 Facsimile: (415) 986-8054

9
 10 STEPHEN E. RAY (*Pro Hac Vice*)
 11 STEIN, RAY & HARRIS LLP
 12 Stein Ray & Harris
 13 222 West Adams Street, Suite 1800
 14 Chicago, IL 60606
 15 Telephone: (312) 641-3700
 16 Facsimile: (312) 641-3701

17 Attorneys for Plaintiff BOVIS LEND LEASE, INC. as assignee of LNR-LENNAR
 18 BRANNAN STREET, LLC

Gordon & Rees LLP
 275 Battery Street, Suite 2000
 San Francisco, CA 94111

19
 20
 21
 22
 23
 24
 25
 26
 27
 28

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

19
 20
 21
 22
 23
 24
 25
 26
 27
 28

BOVIS LEND LEASE, INC. as assignee of LNR-LENNAR BRANNAN STREET, LLC)	CASE NO. C 07-05262 JSW
Plaintiff,)	MEMORANDUM OF POINTS AND
vs.)	AUTHORITIES IN OPPOSITION
MBH ARCHITECTS, INC. aka MCNULTY BRISKMAN HEATH and DOES 1 through 150, inclusive,)	TO MOTION FOR LEAVE TO
Defendant.)	FILE A THIRD PARTY
)	COMPLAINT AGAINST LNR-LENNAR BRANNAN STREET, LLC
)	Date: April 4, 2008
)	Time: 9:00 a.m.
)	Judge: Hon. Jeffrey S. White

Plaintiff Bovis Lend Lease, Inc. ("BOVIS") submits the following opposition to
 Defendant MBH Architects, Inc. aka McNulty Briskman Heath's ("MBH") motion for leave to
 file a third party complaint against LNR-LENNAR BRANNAN STREET, LLC ("LENNAR").

I. INTRODUCTION

2 LENNAR assigned its rights under the MBH-LENNAR contract to BOVIS as part of a
3 negotiated settlement. BOVIS subsequently filed this current action, as LENNAR'S assignee,
4 against MBH, alleging claims related to the deficient design work performed by MBH. Pursuant
5 to the MBH-LENNAR contract, LENNAR is obligated to indemnify MBH only for claims that
6 arise out of the negligent errors, acts, or omissions of either LENNAR or its subcontractors.
7 LENNAR has no contractual duty to indemnify MBH for claims related solely to the
8 professional services performed by MBH. As such, impleader is improper as LENNAR can
9 never be held liable for MBH's own design work. BOVIS respectfully requests that the motion
10 for leave be denied. Alternatively, BOVIS respectfully requests that the matter be remanded to
11 state court.

II. STATEMENT OF FACTS

13 This matter arises out of the design and construction, of the real property and residential
14 homes known as Brannan Square located at 200 Brannan Street in San Francisco, California
15 (hereinafter “Project”.) (Declaration of S. Mitchell Kaplan (“Kaplan Declaration”) ¶ 3 Ex. A.)
16 On or about January 24, 2000, LENNAR entered into an agreement with MBH for the provision
17 of architectural design services for the Project. (Kaplan Declaration ¶ 3 Ex. A, Complaint for
18 Damages, Ex. A.) In May 2006, as part of a settlement of disputes between BOVIS and
19 LENNAR, LENNAR assigned to BOVIS all of LENNAR’S rights and remedies against MBH
20 and each of MBH’s subconsultants. (Kaplan Declaration ¶ 3 Ex. A, Complaint for Damages ¶ 8.)
21 Consequently, this action, which involves claims and damages suffered by LENNAR arising
22 from MBH’s deficient plans and specifications, is brought in the name of BOVIS as party
23 plaintiff. (Kaplan Declaration ¶ 3 Ex. A, Complaint for Damages ¶ 8.)

24 The complaint alleges that MBH failed to provide proper plans and details for the Project,
25 which in turn delayed the completion of the project as well as contributed to significant
26 construction defect claims by the residents of 200 Brannan. (Kaplan Declaration ¶ 3 Ex. A,
27 Complaint for Damages ¶ 12.) The complaint alleges that MBH breached the terms and
28 conditions of the contract, by failing to provide proper plans and details for the Project. (Kaplan

1 Declaration ¶ 3 Ex. A, Complaint for Damages ¶ 12.) Specifically, BOVIS alleges that MBH
 2 improperly designed, inspected, supervised and planned key elements of the Project. As a result,
 3 BOVIS alleges that it has expended in excess of \$5 million in extra work, repairs, investigation
 4 costs, experts fees, and litigation costs as a result of MBH's deficient work. (Kaplan Declaration
 5 ¶ 3 Ex. A, Complaint for Damages ¶¶ 12 & 13.)

6 MBH claims that LENNAR must indemnify it according to the MBH- LENNAR
 7 contract. The MBH- LENNAR contract states in specific, “the owner[LENNAR] shall
 8 indemnify and hold harmless Professional[MBH] from losses, costs, claims, damages, liabilities
 9 and attorneys’ fees which Professional incurs as a result of any negligent errors, acts or
 10 omissions of Owner or any contractor or subcontractor employed or retained directly by
 11 Owner.” (Kaplan Declaration ¶ 3 Ex. A, Complaint for Damages, Ex. A ¶ 6.07, *emphasis*
 12 *added.*)

13 III. **PROCEDURAL BACKGROUND**

14 On June 12, 2007, BOVIS, as assignee of LNR-LENNAR BRANNAN STREET, LLC,
 15 filed an action in the Superior Court of the state of California in and for the County of San
 16 Francisco, entitled *Bovis Lend Lease, Inc., Plaintiff vs. MBH Architects, Inc.*, as Case Number
 17 CGC07-464235. On October 16, 2007, MBH, a California Corporation, removed this matter to
 18 U.S. District Court in the Northern District.

19 On June 15, 2007 the 200 Brannan Owners Association (“200 BOA”) served LENNAR,
 20 under California State Law, with a notice of commencement of Legal Proceeding under Civil
 21 Code Section 895 et. seq., also known as the Calderon proceedings. 200 BOA made
 22 construction deficiency claims as to the common areas in their condominium complex. Several
 23 of the claims relate to MBH’S design.

24 On May 4, 2007 Michael Cullen filed a complaint against LENNAR in California state
 25 court. Plaintiff Cullen alleged construction defects related to the purchase of his condominium at
 26 the property. Additionally, plaintiff alleges derivative claims on behalf of the HOA. The claims
 27 alleged by Cullen include design related claims involving MBH’s scope of work.

28 IV. **LEGAL ARGUMENT**

1 **A. MBH Has No Right of Impleader**

2 Contrary to MBH's contention in its moving papers, MBH is not guaranteed the right of
 3 impleader. Rule 14(a) is procedural and does not create a substantive remedy. To utilize Rule
 4 14, a third-party plaintiff must demonstrate an existing right of action against the third-party
 5 defendant.(See *Andrulonis v. United States* (2nd Cir. 1994) 26 F. 3d 1224, 1233.) Impleader is
 6 only proper under Rule 14 where a defendant seeks to join "a nonparty who *is or may be liable*
 7 to it or all or part of the claim against it." (FRCP14(a))(emphasis added.) Here, MBH *cannot*
 8 show that LENNAR would ever be liable to MBH for the claims asserted by BOVIS as
 9 LENNAR's assignee in its complaint. Specifically, MBH's indemnity theory is circular. MBH
 10 is demands that LENNAR indemnify MBH for LENNAR's own damages.

11 MBH's sole claim against LENNAR stems directly from a contractual indemnity clause
 12 contained in the MBH-LENNAR agreement. The indemnity provision contained in that
 13 agreement states that LENNAR will indemnify MBH *only* for claims which are the result of "any
 14 negligent errors, acts or omissions of [LENNAR] or any contractor or subcontractor employed or
 15 retained directly by [LENNAR]." (Kaplan Declaration ¶ 3 Ex. A, Complaint for Damages, Ex.
 16 A ¶ 6.07.) BOVIS' claims, as assignee of LNR-LENNAR BRANNAN STREET, LLC, against
 17 MBH are related solely to the professional services rendered by MBH on the project, including
 18 preparation of plans and specifications, conformance to applicable building codes and industry
 19 standards, and consulting services. None of the claims asserted by BOVIS involve or relate to
 20 any actions or omissions by either LENNAR or any of its subcontractors. The allegations
 21 specifically target services provided by MBH or its design subconsultants only. Based on the
 22 claims asserted by BOVIS against MBH, the indemnity provision is not triggered, and as such,
 23 MBH cannot establish that LENNAR either "is or may be liable" for any of BOVIS' claims. As
 24 a result, impleader as to LENNAR is improper, and MBH's motion should be denied.

25 **B. MBH's Claim Against LENNAR is Completely Independent of Those
 26 Raised by BOVIS, Making Impleader Improper**

27 Based upon BOVIS' design-related claims alleged in the operative complaint, any claim
 28 by MBH against LENNAR would be independent from those made by BOVIS. MBH alleges

1 that its indemnity claims are transactionally related to those raised in BOVIS' complaint,
 2 therefore giving it the right to impleader. However, "impleader does not lie for independent
 3 claims against third parties, even if those claims are transactionally related to the plaintiffs
 4 actions against the defendant." *United States v. One 1077 Mercedes Benz*(9th Cir. 1983) 708 F.
 5 2d 444, 4452.

6 MBH's claim against LENNAR is a complete and separate claim from those asserted by
 7 BOVIS. BOVIS' claim against MBH is based solely on MBH's design-related actions on the
 8 Project. BOVIS does not allege nor raise any issues in its complaint regarding the performance
 9 of either LENNAR or its subcontractors. In fact, BOVIS' claim was tailored specifically to
 10 address only the design-related deficiencies with the Project which were the sole responsibility
 11 of MBH and its subconsultants. As such, any claim by MBH regarding the alleged negligence of
 12 parties not involved with the design of the Project would be considered independent claims, and
 13 improper for purpose of impleader.

14 **C. Impleading Lennar will Only Complicate the Issues**

15 MBH argues that the court should liberally construe in favor of MBH to allow the motion
 16 for impleader. While this may be proper, the Court should only find impleader appropriate after
 17 balancing the benefits afforded to the defendant against the possible prejudice to the plaintiff and
 18 third party defendant, the complication of issues at trial, the merits of the third party complaint
 19 and any additional costs that may be incurred by the parties.

20 In this case, any benefit gained by MBH is greatly outweighed by the prejudice to both
 21 BOVIS and LENNAR. BOVIS and LENNAR has settled the matters between them, resulting in
 22 the assignment of rights that gives rise to this action against MBH. BOVIS has specifically
 23 raised only those claims relating to the design of the Project; an issue that was not litigated in the
 24 previous action between BOVIS and LENNAR. The only entity responsible for the design of the
 25 Project was MBH. MBH now seeks to implead LENNAR into this action, and essentially turn a
 26 design-related case into a re-litigation of issues already settled. LENNAR will be forced to
 27 defend meritless claims against it, and BOVIS will incur additional costs while MBH attempts to
 28 prove that a party, who was not involved with the design of the project, was somehow negligent

1 with regards to the preparation and execution of the design.

2 The addition of LENNAR will only complicate the issues at trial. While BOVIS' claims
3 is for design-related issues only, MBH's third party complaint raises not only contractual
4 interpretation issues, but will require a finding of negligence as to either LENNAR or its various
5 subcontractors. Wherein BOVIS' claim seeks only to explore the contract between MBH and
6 LENNAR, and the professional standard of care for an architect, MBH's claim seeks to expand
7 these issues to include, potentially, the duties and standard of care for various different
8 contractors, and whether or not there was a breach of those duties. Impleader will greatly expand
9 the triable issues in this matter.

10 Moreover, MBH's third party complaint has absolutely no merit. As discussed above, the
11 indemnity provision which MBH relied on only provided indemnity for claims against MBH that
12 arise from the "negligent errors, acts, or omissions" of either LENNAR or its subcontractors.
13 Because BOVIS' claims against MBH are solely design-related, and thus were the sole
14 responsibility of MBH and its subconsultants, LENNAR could never be liable to indemnify
15 MBH for its sole negligence. As such, allowing impleader will be a waste of judicial resources,
16 not to mention a financial burden on both LENNAR and BOVIS in having to litigate a meritless
17 claim.

18 In balancing the above considerations, it is apparent that impleader is improper in this
19 situation. MBH's third party complaint is meritless and will only complicate the triable issues in
20 this matter. As such, MBH's motion should be denied.

21 **D. MBH's Removal was Improper Based on Section 1441**

22 Alternatively, should the Court grant MBH's motion for leave, BOVIS, respectfully
23 requests that the matter be remanded to state court based upon MBH's California residence.
24 MBH, a California corporation, improperly removed this matter to District Court. According to
25 28 U.S.C.A. section 1441(b)

26 Any civil action of which the district courts have original
27 jurisdiction founded on a claim or right arising under the
28 Constitution, treaties or laws of the United States shall be
removable without regard to the citizenship or residence of the
parties. Any other such action shall be removable only if none of

Gordon & Rees LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111

the parties interest properly joined and served as defendants is a citizen of the State in which such action is brought. (emphasis added).

A local defendant cannot remove a matter to District Court based on diversity jurisdiction. (*Spencer v. United States Dist. Ct. for Northern Dist. Of Calif* (*Altec Industries, Inc.*)) (9th Cir. 2004) 393 F. 3d 867, 870.) MBH is a resident of California, and therefore its request for removal was improper. Based upon the improper removal, BOVIS respectfully request that this matter be remanded back to state court.

In addition, judicial economy would be served if this matter were remanded to State Court. In light of the design claims raised by 200 BOA through the Calderon proceeding, as well as the *Cullen* matter proceeding in State Court, judicial economy would be served if all three actions proceeded concurrently in State Court.

IV. CONCLUSION

In sum, this motion should not be granted in order to avoid judicial inefficiency and since LENNAR is not a proper third party impleader.

Dated: March 7, 2008

GORDON & REES LLP

By: S. Mitchell Kaplan
S. MITCHELL KAPLAN
Attorneys for Plaintiff BOVIS LEND LEASE,
INC. as assignee of LNR-LENNAR
BRANNAN STREET, LLC